Supreme Court, U.S.
FILED

971512 OCT 15 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1997

♦

WILLIE H. BANKHEAD

Petitioner,

v.

STATE OF MISSISSIPPI, ET AL.

Respondents.

♦

PETITION FOR WRIT OF CERTIORARI

♦

WILLIE H. BANKHEAD
2207 Washington Ave
Columbus, Ms. 39701
601.327.9746
PETITIONER, PRO SE

51 pp

QUESTIONS PRESENTED FOR REVIEW

When an individual is given notice of a hearing (spears evidentiary) before a competent and impartial tribunal and at this hearing the court fails to give said individual an opportunity to be heard upon any questions involving his right or interest and thereafter the court passes it's judgment '; thereby depriving the individual of his interest, should such judgment stand or be vacated?

Following his criminal conviction, serving thirty-nine (39) months imprisonment of a five (5) year prison sentence and the state's supreme court overturning said conviction; should Bankhead (at no time having previously asserted claims of malicious prosecution in any court) be barred by doctrine of res judicata from prosecuting a cause of action styled malicious prosecution and unlawful imprisonment?

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Supreme Court Rules, rule 14.1 (b) the following is a list of all parties and whose judgment is sought to be reviewed.

Willie H. Bankhead, Petitioner
2207 Washington Ave
Columbus, Ms. 39701

John L. Clay
Attorney for Respondents
Office of SAAG
P.O. Box 220
Jackson, Ms. 39205

State of Mississippi, Respondent
Office of SAAG
P.O. Box 220
Jackson, Ms. 39205

Patrica Sproat, Respondent
Office of SAAG
P.O. Box 220
Jackson, Ms. 39205

City of Columbus, Respondent
P.O. Box 1408
Columbus, Ms. 39703

Donald Freshour, Respondent
P.O. Box 1408
Columbus, Ms. 39703

John Peevey, Respondent
P.O. Box 1408
Columbus, Ms 39703

David Turner, Respondent
P.O. Box 1408
Columbus, Ms. 39703

Larry Taylor, Respondent
P.O. Box 1408
Columbus, Ms. 39703

Brain Osterhouse, Respondent
P.O. Box 1408
Columbus, Ms. 39703

Selvain McQueen, Respondent
P.O. Box 1408
Columbus, Ms. 39703

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Willie H. Bankhead, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit (App.1,2)is unreported. The opinion of the District Court (App.3-5) is unreported.

JURISDICTION

Petitioner appealed to the Fifth Circuit the District Court's final order and judgment barring, by doctrine of res judicata petitioner's claims of malicious prosecution.

The Fifth Circuit on 6-17-97 after it's review of the record dismissed petitioner's appeal as frivolous and on 7-17-97 denied Bankhead's petition for rehearing.

By statute 28 USCS § 1254 petitioner invoked this court's jurisdiction to review the judgment in question.

28 USCS § 1254 provides that cases in the courts of appeal may be reviewed by the Supreme Court by the following method:

(1) By Writ of Certiorari granted upon petition of any party to a civil or criminal case before of after rendition of judgment or decree;

STATEMENT
(PROCEDURAL HISTORY)

2-6-90 Respondents Taylor, McQueen and Peevey initially arrested and incarcerated petitioner for an alleged offense of voyeurism occurring

on 2-6-90 against Maria Krupica.

2-7-90 Respondents Freshour, Turner and Osterhouse without petitioner's knowledge or authorization, or respondents legal authority conducted a search of petitioner's residence, a dwelling house owned by petitioner's mother (Ollie Sledge). For the most part said search was conducted in petitioner's bedroom where his locked briefcase was discovered. Osterhouse requested permission of Ms. Sledge to break open this briefcase. Permission was given by Ms. Sledge and Osterhouse, with the aide of an implement broke open said briefcase. Within were documents regarding petitioner's general discharge from the U.S. Army. Upon viewing and gaining knowledge of documents substance, respondents departed the dwelling. Respondent Freshour swore to a criminal affidavit charging petitioner with voyeurism against Darlene Black, alleged to have occurred on 2-6-90 at or about the same place and time as the above offense against Maria Krupica. Respondents Osterhouse and Turner followed by officially charging petitioner with two (2) counts of voyeurism (both counts were alledged to have occurred at or about the same place and time). Petitioner posted a bond and was released from respondents custody pending further proceedings.

2-8-90 Respondents Peevey swore to a criminal affidavit charging petitioner with voyeurism allegedly to have occurred on 2-6-90 against Maria Krupica. By authority of this affidavit a warrant was issued and Respondents Peevey, Taylor, Pickens and a patrolman arrested petitioner at his residence. Petitioner informed respondents that this was one of the two offenses for which he was charged with on 2-7-90, posted a bond and was thereafter released from custody. Respondents; however incarcerated petitioner for approximately thirty-five (35) days.

3-14-90 Petitioner having rendered no other moneys or collateral (other than that given on 2-7-90 to gain his release) was again released from respondent's custody.

12-3-90 Petitioner was tried by a jury in state court; convicted of voyeurism and on 12-6-90 sentenced to five (5) years imprisonment in custody of M.D.O.C.

11-15-90 While in custody of M.D.O.C. awaiting judgment of the above conviction appealed, petitioner filed in U.S. District Court a cause of action styled illegal search and seizure stemming from Respondents City of Columbus , David Turner, Donald Freshour and Brian Osterhouse search of petitioner's residence on **2-7-90.**

12-14-91 Petitioner filed in U.S. District Court a cause of action styled unlawful arrest and imprisonment as a result of Respondents City of Columbus, Billy Pickens, Larry Taylor and John Peevey rearest and incarceration of Bankhead on **2-8-90.**

1-14-93 Petitioner yet in custody of M.D.O.C., a spears evidentiary hearing was held; the above two causes were allowed to proceed and summons were issued.

10-21-93 Petitioner's criminal conviction on **12-3-90** is overturned.

12-3-93 Forty (40) days following reversal, petitioner was released from custody of M.D.O.C..

1-31-94 Petitioner being aggrieve following thirty-nine (39) months in custody of M.D.O.C. pursuant to **42 USCA § 1983** filed in U.S. District Court a cause of action styled Malicious Prosecution and Unlawful Imprisonment.

3-7-94 Petitioner's complaint styled unlawful arrest and imprisonment (Bankhead I) is adjudged by the court for defendants against Bankhead.

8-18-94 Petitioner's complaint labeled illegal search and seizure (Bankhead II) is adjudged by the court for defendants against Bankhead.

11-16-94 Fifth Circuit affirms district court's judgment in Bankhead II.

4-17-95 U.S. Supreme Court denies writ of certiorari in Bankhead II.

5-18-95 A spears evidentiary hearing is held regarding this instant cause. No questions or statements were exchanged between the court, attorney for respondents or petitioner concerning facts and issues complained of. The court however stated that it would take the matter under advisement and inform petitioner if any or all defendants would be dismissed.

10-26-95 District Court recommended this cause be dismissed in that the claims in this case are virtually identical to those in a previous case filed by Bankhead in district court. Further that pauper status does not entitle a plaintiff to avoid the ordinary rules of **res judicata** if they seek to relitigate claims that allege substantially the same facts arising from a common series of events which have already been unsuccessfully litigated by the plaintiff or which are duplicative of still-pending lawsuits filed by the same plaintiff.

10-17-96 District Court in it's Final Order and judgment accepted and adopted the above Report and Recommendation as the opinion of the court and dismissed this cause with prejudice.

Bankhead appealed the district court's dismissal to the Fifth Circuit Court of Appeals and argued that one fundamental test applies for comparing causes of action for purpose of applying doctrine or **res judicata** is whether the primary right of duty and delict or wrong, are the same in each action. Under this test there is but one cause of action where there is but one right in plaintiff and one wrong on the part of the defendant involving that right. To apply principle of **res judicata**, the rule that once a matter has been finally adjudicated no subsequent action may be maintained, four criteria must be met: (1) the parties must be identical in both suits, (2) the prior judgment must have been rendered by a court of competent jurisdiction, (3) there must be a final judgment on the merits and (4) the same cause of action must be involved in cases . Fifth Circuit ordered Bankhead to comply with the Prison Litigation Reform Act of 1995 (PLRA). Bankhead complied by paying the full filing fee of $105.

The Fifth Circuit rejected Bankhead's reliance on Russell v. Sunamerica Securities, Inc. (5th Cir. 1992) 962 F. 2d 1172 and McKinnon v. Blue Cross Blue Shield of Alabama (11th Cir. 1991) 935 F. 2d 1187 and dismissed Bankhead's appeal as frivolous. On **7-17-97** Fifth Circuit denied Bankhead's petition for a rehearing.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit and District Court's decision is in direct conflict with the Constitutional principles this Court announced and used to reach it's decisions in Wisconsin v. Constantineau an opportunity to be heard before one is affected by any judicial decision. This justifies reversal of the lower Courts decision. Further, the lower courts decision is in direct conflict with this Courts decision in Fuentes v. Shevin 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983, wherein this Court citing Wisconsin v. Constantineau held that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.

Finally the District Court and Fifth Circuit decision is in direct conflict with a decision of the Eleventh Circuit in I.A. Durbin Inc. v. Jefferson National Bank 793 F. 2d 1541 (11th Cir. 1986) wherein the Eleventh Circuit concluded that the district court abused it's discretion in applying the doctrine of res judicata.

I) THE FIFTH CIRCUIT AND DISTRICT COURT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN FUENTES V. SHEVIN, WISCONSIN V. CONSTANTINEAU, THE UNITED STATES CONSTITUTION AND THE FOURTEENTH AMENDMENT

Following the reversal of Bankhead's criminal conviction (App. 1) and his being released on **12-3-93** from the custody of Mississippi Department of Correction, Bankhead on **1-31-94** filed in U.S. District Court a cause of action styled Malicious Prosecution and Unlawful Imprisonment. This Court in Heck v. Humphrey, et al 512 US, 129 L ed ed 383, 114 S Ct 2364 (1994) held that a claim of damages for an allegedly unconstitutional conviction or imprisonment, or other actions whose unlawfulness would render a conviction or sentence invalid is not cognizable under **42 USCS § 1983** unless the plaintiff proves the conviction or sentence has been reversed on appeal.

On **5-18-95** a spears evidentiary hearing was held in U.S. District Court (App.31-34) Without allowing Bankhead an opportunity to be heard,

the Court stated to Bankhead that it would take this matter under advisement and thereafter inform Bankhead if any or all of the defendants would be dismissed.

Feuntes and Parham 407 US 67, 32 L Ed 2d 556,92 S Ct 1983 involved two separate actions before three-judge Federal District Courts, the prejudgment replevin laws of Florida and Pennsylvania - authorizing summary seizures of goods and chattels by state agents upon ex parte application by a private person who posted a security bond for double the value of the property were challenged as violative of the due process clause of the Fourteenth Amendment, since no hearing was afforded to the possessor prior to seizure of the goods.

On direct appeal, the United States Supreme Court vacated the judgments of both District Courts and remanded the cases. In an opinion by Stewart, J., expressing the views of four members of the Court, it was held that the replevin law of both states violated the due process clause of the Fourteenth Amendment insofar as they denied the right to a prior opportunity to be heard before chattels were taken from their possessor. The Court in citing Wisconsin v. Constantineau 400 U S 433,437, 27 L Ed 2d 515,519, 91 S Ct 507 has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before deprivation at issue takes effect.

An opportunity to be heard is one of the essentials of due process of law and a hearing which does not give a party an opportunity to be heard cannot constitute due process of law. In violating the due process clause of the Fourteenth Amendment, the District Court and Fifth Circuit have rendered **voidable judgments**, therefore; without aid or support, this argument alone justifies reversal of the Fifth Circuit's decision.

II) THE U.S. DISTRICT COURT AND FIFTH CIRCUIT'S DECISIONS ARE IN DIRECT CONFLICT WITH A DECISION OF THE ELEVENTH CIRCUIT

The District Court in it's report recommended this immediate action be dismissed (App.3-5) and for cause stated that Bankhead seeks to relitigate claims that substantially allege the same facts in Bankhead I (App.20-22) and Bankhead II (App.12-16) which have already been unsuccessfully litigated.

Bankhead appealed District Court's decision to the Fifth Circuit. Fifth Circuit ordered (App.23,24) Bankhead to comply with the Prison Litigation Reform Act of 1995 (PLRA). Bankhead complied by paying filing fee of $105. The Fifth Circuit after it's review of the record affirmed District Court's decision and dismissed Bankhead's appeal as frivolous.

In Bankhead II, Bankhead argued that he had a reasonable expectation of privacy in his locked briefcase, and thus his mother had no lawful authority to consent to defendants breaking and opening briefcase and viewing documents within. Defendants argued (App.8-11) that they had consent and also exigent circumstances for the search. District Court ruled (App. 6,7) for defendants against Bankhead.

In Bankhead I (App.20-22) Bankhead argued that on 2-7-90 he was officially charged with two (2) counts of voyeurism (both alleged to have occurred at or about the same place, date and time) one each against Maria Krupica and Darlene Black. Bankhead had posted a bond and was released from defendants custody pending further proceedings. Further that on 2-8-90 Defendant Peevey swore to a criminal affidavit alleging Bankhead had committed voyeurism against Maria Krupica on 2-6-90. Defendants obtained an arrest warrant; rearrested and incarcerated Bankhead for thirty-five (35) days. Defendants argued (App.20-22) that the second arrest on 2-8-90 was the results of Maria Kurpica's complaint; therefore pursuant to a valid arrest warrant. Finally Bankhead argued that the second arrest occurred on 2-8-90 and Ms. Krupica gave her statement on 2-15-90, seven (7) days following the second arrest; therefore the second arrest was the results of Defendant Peevey swearing to a criminal affidavit. The District Court ruled (App. 17-19) for defendants against Bankhead.

In applying principles of **res judicata** to bar a pending action where a party is attempting to relitigate matters that were litigated in an earlier suit, four elements must be met; (1) there must be a final judgment on the merits; (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties must be identical in both suits; and (4) the same cause of action must be involved in both cases. In Bankhead II, it was Bankhead's burden to prove beyond a doubt that Defendants City of Columbus, Donald Freshour, David Turner and Brian Osterhouse without probable cause or exigent circumstances entered the dwelling house of Bankhead's mother; forced opened Bankhead's locked briefcase; viewed documents within and thereafter proceeded to and officially charged Bankhead with two counts of voyeurism. In Bankhead I, Bankhead had

the burden of proving that Defendants City of Columbus, Billy Pickens, John Peevey and Larry Taylor without probable cause on 2-8-90 rearrested and incarcerated Bankhead for thirty-five (35) days. Bankhead claims of Malicious Prosecution and Wrongful Imprisonment was the results of a parties (pgs. II & III) false and perjured criminal affidavits, perjured testimonies, the court allowing evidents and testimonies of other alleged criminal acts not relevant to the offense Bankhead was being tried for and the Court's failure to comply with Mississippi Criminal Court Rules, all of which Bankhead's conviction being reversed (App. 30) was the consequence. **In applying principles of res judicata, the sole element satisfied here is that the earlier decisions were rendered by a court of competent jurisdiction.**

The District Court and Fifth Circuit's decisions are in direct conflict with the Eleventh Circuit's decision in I.A. Durbin v. Jefferson National Bank. Durbin construction and it's president Betty Kail were indebted to a bank, sued the bank and others claiming constitutional and state law violations in connection with prejudgment replevin in a foreclosure actions. Durbin was alleged to have defaulted on a loan. The Bank filed suit seeking damages, foreclose on Kail's residence and amended the complaint requested replevin of the household furnishing. While a Deputy Sheriff and others executed the writ of replevin, Durbin filed a voluntary petition for bankruptcy. The Deputy Sheriff was informed of the filing of the bankruptcy petition and immediately ceased execution of the writ. Dubin asserted that the seizure of household furnishings pursuant to the writ of replevin violated the automatic stay of 11 U.S.C.A.. The Bank refused to return the furnishings and Durbin moved to have the Bank's vice president and others held in contempt of the automatic stay ("contempt proceedings"). In an order entered, the bankruptcy court concluded (1) the defendants should not be held in contempt since execution of the writ was prior to Durbin filing the bankruptcy petition and (2) that Bank and it's counsels would have been in contempt but for the fact that they ultimately offered to unconditionally return the personalty at a time prior to the hearing. The bankruptcy court concluded that Florida's statutory provisions for issuance of a prejudgment writ of replevin had been found constitutional by the Florida Supreme Court. The bankruptcy court awarded Durbin attorneys fee and explained that it's prior decision had been confined to the issue of contempt.

Durbin moved to have the state foreclosure action moved to bankruptcy court. The state action was moved to federal court and

referred to bankruptcy court. In it's answer Durbin raised several counter claims against the Bank, alleging the Bank had committed trespass, wrongful conversion and civil theft. Durbin then filed an action in bankruptcy court for turnover of the furnishings held by bank and the court ordered Bank to deliver this property to Durbin. Durbin filed a suit in U.S. District Court against the Bank and it's party involved in the issuance and execution of the writ of replevin alleging they had deprived them of the right to due process of law under Fifth and Fourteenth Amendment, the right to be free from unreasonable searches and seizures and the right to equal protection of the law under the Fourteenth Amendment in violation of 42 U.S.C.A. § 1983.

Appellees filed motions to dismiss the § 1983 action on two grounds: (1) that the findings of the bankruptcy court in the contempt proceeding barred the instant suit under the doctrines of collateral estoppel and res judicata; and (2) that since the bankruptcy court had found that they had acted in good faith, and since they are entitled to qualified immunity in a § 1983 action, such a finding precluded liability in the instant case.

The District Court observed that if the bankruptcy court detetmined that appellants claims were without merits in the proceedings against the replevin bond such a finding would be given the effect of collateral estoppel or res judicata in the instant case, and that if appellants were awarded judgment in the proceeding against the replevin bond, appellees could raise that judgment in the instant case as an affirmative defense of satisfaction. The Court next pointed out that in the contempt proceeding, the bankruptcy court had already considered" the issue of whether replevin was obtained wrongfully or in bad faith in the state court action," and concluded that "[t]o the extent that the Bankruptcy Court had made a final determination.... as to the issue of wrongful conduct in obtaining and executing the writ of replevin, that determination would bar re-litigation of that issue in this court." Finally the court concluded that even if a final determination had not yet been made in the bankruptcy suit with respect to the issue of damages or the question of good faith, the suit should still be dismissed because it was "duplicative" of the foreclosure action pending in the bankruptcy court.

Durbin appealed to the Eleventh Circuit district court's dismissal of their damage claims contending that the dismissal of their damage claims was improper because (1) These claims are not barred be the doctrines of res judicata or collateral estoppel, and (2) the § 1983 suit is not duplicative of the state foreclosure action in the bankruptcy court.

The Eleventh Circuit held that the civil rights action was not barred under the doctrine of res judicata by the contempt proceeding, since the causes of action in the two proceedings are not the same. The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. See, e.g., White v. World Finance of Meridian Inc., 653 F.2d 147, 150 (5th Cir. Unit A 1981). In determining whether the causes of action ate the same, a court must compare the substance of the action, not their form. See, e.g., White, 653 F. 2d at 150.

Applying these principles to that case, the Eleventh Circuit held that the contempt proceeding and the § 1983 suit did not involve the same cause of action. In the contempt proceeding, the primary right at issue was Durbin's right, under 11 U.S.C.A. to prevent appellees from taking possession of the property after the filing of the bankruptcy petition. The primary right in the civil rights action, on the other hand, was appellants' rights to be free from unreasonable searches and seizures and to due process in the taking of their property. Since the substance of the two causes of action were different, the application of res judicata was held inappropriate.

The district court also decided in conclusory fashion that even if the doctrine of res judicata and collateral estoppel were inapplicable, the instant case should be dismissed because the foreclosure action pending in the bankruptcy court raised similar issues. The Eleventh Circuit held, however, that since the § 1983 suit is not duplicative of the foreclosure action the district court abused it discretion in dismissing the case.

As in this immediate action, Bankhead's claims of Malicious Prosecution & Wrongful imprisonment are not duplicative of the previous illegal search & seizure and unlawful arrest & imprisonment suits. The District Court here has abused it discretion in dismissing this case by applying doctrine of res judicata and the Fifth Circuit followed by dismissing Bankhead's appeal as frivolous.

♦

CONCLUSION

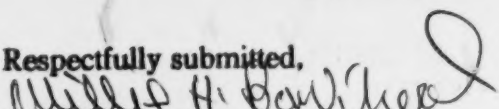
I hereby declare under penalty of perjury that on March 10, 1998 I received a copy (that was place in the U.S. Mail on March 9, 1998 and addressed to me) of the proceedings **(at App. 31-34)** recorded and taken on May 18, 1995 regarding this instance case.

I have stated within this petition that I was not given an opportunity to speak at the Spears Evidentiary Hearing. After a review of the transcirpt I hereby **recant** that statement. Further, in order to comply with Supreme Court Rule 14.5 at this date I did not have time to remove that statement from the contents of this petition.

Before submitting it's Report and Recommendation regarding this instant case, the District Court was in possession of the court records of the two previous case involving the claims of unlawful arrest & imprisonment and illegal search & seizure. After a review of the entire record the court should have determined that res judicata did not apply and thereafter allowed process to issue. Then Bankhead would have been given the opportunity to be heard upon every issue and claim alleged.

Because the District Court and Fifth Circuit have rendered a judgment without hearing or giving Bankhead the opportunity to be heard upon every question and issue regarding his rights and interest, thereby they have violated the Fourteenth Amendment and is in direct conflict with this Court's decision, in Fuentes v. Shevin and Wisconsin v. Constantineau. Secondly the District Court has abused it's discretion by applying doctrine of res judicata to dismiss Bankhead's claims of malicious prosecution. The decision of the District Court and Fifth Circuit should be summarily reversed and vacated and this action remanded to the United States District Court. In the alternative, the petition for writ of certiorari should be granted.

Respectfully submitted,



Willie H. Bankhead
Petitioner, Pro Se
2207 Washington, Ave
Columbus, Ms. 39701
601.327.9746

App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60804

WILLIE H. BANKHEAD

Plaintiff - Appellant

V.

STATE OF MISSISSIPPI; PATRICIA SPROAT;CITY OF COLUMBUS; DONALD FRESHOUR; JOHN PEEVEY; DAVID TURNER; LARRY TAYLOR; BRIAN OSTERHOUSE; SELVAIN MCQUEEN

Defendants - Appellees

Appeal from the United States District Court for the
Northern District of Mississippi, Aberdeen

Before SMITH, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

"s/_____".
United States Circuit Judge

U.S. COURT OF APPEALS
FILED
JUL 17 1997
CHARLES R. FULBRUGE III
CLERK

App. 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60804
Conference Calender

WILLIE H. BANKHEAD,

Plaintiff-Appellant

versus

STATE OF MISSISSIPPI ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:94 CV26-S-D

Before SMITH , STEWART, and DENNIS, Circuit Judges.
PER CURIAM:

Former prisoner Willie Bankhead appeals from the dismissal of his civil rights complaint as frivolous. Bankhead contends that the district court erred by dismissing his complaint on the ground that he attempts to relitigate claims alleging substantially the same facts arising from a common series of events that already have been litigated. We have reviewed Bankhead's brief and the record and we find Bankhead's appeal frivolous. See Pittman v. Moore, 980 F.2d 994, 994 (5th Cir. 1993).

APPEAL DISMISSED. 5th Cir. R. 42.2.

Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47. 5 . 4 .

U.S. COURT OF APPEALS
FILED
JUN 17 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIE H. BANKHEAD,
Plaintiff,

v. NO. 1: 94CV26-S-D

STATE OF MISSISSIPPI, et al.,
Defentants.

ORDER AND FINAL JUDGMENT

This cause is before the court for consideration of the magistrate judge's Report and Recommendation that this cause be dismissed and the plaintiff's objections thereto. Having carefully considered the matter, including a transcript of the Spears hearing and the complaints filed in cause numbers 1:91CV336 and 1:91CV359, the court is of the opinion that the magistrate judge was imminently correct in his assessment of the facts and the law in reaching his conclusion that the instant action is barred by the doctrine of res judicata. The facts and claims raised in this case are identical to the facts and issues raised in the two above mentioned actions, giving rise to a classic example of res judicata. Accordingly, it is ORDERED:

That the Report and Recommendation, along with the above comments, is accepted and adopted as the opinion of the court;

That this cause is hereby dismissed with prejudice.

SO ORDERED this 18th day of October, 1996.

"s/ L.T. Senter jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIE BANKHEAD — PLAINTIFF

VS. — CIVIL NO. 1:94CV26-S-D

STATE OF MISSISSIPPI, ET AL — DEFENDANTS

REPORT AND RECOMMENDATION

On May 18, 1995, plaintiff, and inmate of the Mississippi Department of Corrections, appeared before the court for a hearing pursuant to Spears v. McCotter, 766 F. 2d 179 (5th Cir. 1985) to determine if there exists a justifiable basis for his claim filed pursuant to 42 U.S.C. §1983.

Bankhead complains of an arrest and seizure of evidence in February 1990 on a charge of voyeurism which was ultimately dismissed. The claims in this case are virtually identical to those in a previous case filed by Bankhead in this court, 1:91CV336-S-D, tried to a jury in August 1994.

Pauper status does not entitle a plaintiff to avoid the ordinary rules of res judicata. In forma pauperis complaints may be dismissed as frivolous if they seek to relitigate claims that allege substantially the same facts arising from a common series of events which have already been unsuccessfully litigated by the plaintiff or which are duplicative of still-pending lawsuits filed by the same plaintiff. Wilson v. Lynaugh, 878 F. 2d 846 (5th Cir. 1989), cert. denied, 493 U.S. 969, 110 S. Ct. 417, 107 L. Ed 2d 382 (1989); Pittman v. Moore, 980 F.2d 994 (5th Cir. 1993).

Accordingly, it is respectfully recommended that this case be **dismissed with prejudice.**

The parties are referred to 28 U.S.C. § 636 (b) (1) (B) and F.R.Civ. P. 72(b) for the appropriate procedure for filing objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging the factual findings on appeal. United States v. Carrillo-Morales, 27 F. 3d 1054,, 1061-62 (5th Cir. 1994), cert.denied ____ U.S. ____, 115 S. Ct. 1163, 130 L Ed 2d 1119 (1995); Douglas v. United Services Auto. Assn., No. 95-50007. (5th Cir. Oct. 2, 1995).

Plaintiff is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgement form and return it to the court within ten days of this date. Because of the misuse of the court's postage-paid envelopes, these envelopes are no longer provided. Plaintiff is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under Fed.R.Civ.P. 41(b) for failure to prosecute and for failure to comply with an order of the court.

Respectfully submitted this 26th day of October, 1995.

"s/Jerry Davis
UNITED STATES MAGISTRATE JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIE H. BANKHEAD

V.

DAVID TURNER
BRYAN OSTERHOUSE
CITY OF COLUMBUS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 1: 91cv336-S-D

[ ] **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the plaintiff take nothing, and that action be dismissed on the merits.

CERTIFYING STAMP
I hereby certify that the foregoing
is a true copy of the original thereof
now in my office

Attest 8/22/94
Norman L. Gillespie, Clerk

By "s M H Gettys

AUGUST 22, 1994
Date

NORMAN L. GILLESPIE
Clerk

"s/Marcia H. Gettys

App. 7

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

NORMAN L. GILLESPIE
CLERK

P.O. BOX 704
ABERDEEN, MS. 39730
601 369 4952

BANKHEAD

vs.

NO: 1:91cv336-S
JURY TRIAL

TURNER

TAKE NOTICE that the following docket entry has been made in the above styled case:

[70-1] (8/22/94) JUDGMENT for City of Columbus, Bryan Osterhouse, David Turner against Willie H. Bankhead signed by the Clerk (on 8/22/94) COB # 48 pg. 41

DATE OF ENTRY: 8/22/94

NORMAN L. GILLESPIE, CLERK
"s/ Marcia H. Gettys
Marcia H. Gettys
Deputy Clerk

DATE: August 22, 1994

App. 8

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIE HOWARD BANKHEAD — PLAINTIFF
VERSUS — CIVIL ACTION NO. EC91-336-S-D
DAVID TURNER, BRIAN OSTERHOUSE, AND CITY OF COLUMBUS — DEFENDANTS

MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

COME NOW the Defendants by and through counsel and file this their Motion to Dismiss and/or for Summary Judgment and would show unto the Court as follows:

1.

The Complaint in this cause states that the Defendants are David Turner and Brian Osterhouse employed as police detectives as the Columbus Police Department and the City of Columbus. The facts as appear at paragraph III of the complaint provides that Defendants Turner and Osterhouse entered the residence of Ollie Mae Sledge and Willie H. Bankhead "without permission or a search warrant" and searched the dwelling. The Defendant detectives then are alleged to have opened a locked briefcase, "read papers" in them and then charged Plaintiff with two counts of voyeurism. The alleged illegal search and seizure occurred on February 7, 1990. It is important to note that the statement or facts by Plaintiff does not involve the detectives taking the documents, but only their reading the documents.

2.

The Defendants are entitled to qualified immunity under law as there is no constitutional right implicated the contours of which are so sufficiently clear that a reasonable official would understand that official's actions violate the law. The proof in subject case reflects that consent to enter the premises for the search was given by Ollie Mae Sledge voluntarily brought the noted documents to the City of Columbus Detective Division days after the search and the documents were not used in Defendant's criminal proceedings.

3.

Plaintiff was properly charged, arrested, incarcerated, held in custody and convicted. An accurate chronology of events as to his arrest, incarceration and conviction is contained in the Affidavit of Pete Bowen,

Chief of Police, attached hereto as Exhibit "A".

4.

The Affidavit of the Chief of Police (Exhibit "A") relates directly to the allegations of illegal search and seizure by demonstrating that a legal and authorized criminal investigation was ongoing at the time of the search thereby confirming the probable cause for the search and the reasonableness of the search. Attached hereto as Exhibit "B" are certified copies of the Indictments of Plaintiff on counts of voyeurism and on habitual offender. These are submitted to confirm the on-going criminal investigation of which was the purpose of the Defendants' search for related evidence.

5.

The Affidavit of Defendant Osterhouse, party Defendant and now a resident of the State of Colorado, is attached hereto as Exhibit "C". Detective Osterhouse affirms under oath that he obtained no documents as a result of the search of the home or residence of Willie H. Bankhead or Ollie Mae Sledge. Detective Osterhouse confirmed that he did conduct a search of the premises at 2207 Washington Avenue, Columbus, Lowndes County, Mississippi, which was the dwelling of Ollie Mae Sledge, after verbal consent to do so was given by Ollie Mae Sledge. He confirms that documents were not obtained durning the search by the Defendant; however, days later, Plaintiff's mother voluntarily brought them to the police department. These documents were not used at Mr. Bankhead's criminal trial or as evidence in his criminal case.

6.

The Affidavit of Defendant of Columbus Police Department Detective David Turner is attached hereto as Exhibit "D". He confirmed that he searched the premises at 2207 Washington Avenue, after being given verbal consent by Ollie Mae Sledge. Detective Turner confirms that no physical evidence was taken from the house and that records were produced later by Ollie Mae Sledge to the police, but were not ever used in any court proceeding against Plaintiff.

7.

Attached hereto as Exhibit "E" is the Affidavit of Donald Freshour who is the Commander of the Criminal Investigative Division of the City of Columbus Police Department. Ollie Mae Bankhead gave verbal consent to search he premises at 2207 Washington Avenue to him and no physical evidence was removed from the house. Commander Freshour confirms that a few days later, Mrs. Sledge brought documents to the investigative division and these documents were copied with the originals given back to Ollie Mae Sledge. These documents were never used in

any court proceedings against plaintiff.

8.

The plaintiff has not stated a claim for an alleged seizure by his own complaint and as confirmed by the Affidavits attached to the motion, there was no seizure. At most, there has been a stated claim for an illegal search in supposed violation of the 4th Amendment prohibition. The seizure claim, therefore, should be dismissed summarily. The search must be determined under the standard of reasonableness. The search occurred with the consent and therefore no constitutional deprivation exists. The premises were not owned by Plaintiff so he has no standing to complain as to the search. There was no damage as a result of the "search and seizure" as no evidence was obtained as a result of the "search or seizure". The documents donated by Mrs. Sledge were not ever utilized in any form against The Defendant. For all of the foregoing reasons, the Complaint should be dismissed and/or the Defendants granted Summary Judgment and/or the Defendants provided protection of qualified immunity.

Respectfully submitted,

BY"s/Katherine S. Kerby
KATHERINE S. KERBY,
FOR DEFENDANTS
MSB #3584

OF COUNSEL:
GHOLSON, HICKS, NICHOLS AND WARD
POST OFFICE BOX 1111
COLUMBUS, MS 39703-1111
(601) 327-0662

CERTIFICATE OF SERVICE

I, the undersigned Katherine S. Kerby, attorney of record for the Defendants herein, do hereby certify that I have This date mailed, postage prepaid, a true and correct copy of the foregoing **MOTION TO COMPEL AND/OR FOR SUMMARY JUDGMENT** to the following:

Willie Howard Bankhead, Pro Se
SMCI # 75900, Unit 12
Post Office Box 1419
Leaksville, Ms.39451

SO CERTIFIED on this the 13th day of August, 1993

"s/Katherine Kerby
KATHERINE S. KERBY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIE H. BANKHEAD — PLAINTIFF
VERSUS — NO. 1: 91CV336-S-D
DAVID TURNER, ET AL — DEFENDANTS

RESPONSE TO ORDER SETTING EVIDENTIARY HEARING
AND A MORE DEFINITE STATEMENT

In responding to attached order, the Plaintiff filed a more definite Statement of Facts, Issues, Brief and Arguments to stay pending Spears Evidentiary Hearing.

STATEMENT OF ISSUES FOR REVIEW

1. After arresting Plaintiff (without a warrant) on February 6, 1990 for an alleged offense of voyeurism was there probable cause to search his place of residence (a dwelling house)?

2. Was there probable cause to search said dwelling without a search warrant or kid exigent circumstances exist to justify entry?

3. In continuing their illegal search, did probable cause exist to force open a locked briefcase (without the knowledge or permission of Plaintiff who was incarcerated) gain knowledge of documents (concerning Plaintiffs military discharge in 1984) within, officially charge Plaintiff with two counts of voyeurism (place Plaintiff under a twenty-five thousand dollar bond pending further court proceedings) release Plaintiff from custody; subsequently receive mentioned documents from one not a residence of dwelling house (in fact a trespasser) without first obtaining a search and utilize documents to indict Plaintiff for two (2) counts of voyeurism?

STATEMENT OF CASE

On February 6, 1990 while sitting on a stairwell of an apartment building observing my disabled vehicle, I was arrested by officers of the Columbus Police Department. On February 7, 1990 during an interrogation, I learned from Detectives Turner and Osterhouse that it was reported by someone at an adjoining building that a person was prying into a window of an apartment. Detective Turner requested permission to search my residence and I refused to give consent. Detective Turner responded by stating that they would probably discover pornographic material. Subsequently I was officially charged with two (2) counts of voyeurism and bond was set a $25,000.00. Bond was posted and I was released pending further court proceedings. I then learned from relatives

that Detectives Turner and Osterhouse had searched our home without a search warrant, nor had my brother (Terry Sledge) consented to officer's request to search. After their initial search, Detectives contacted my mother (Ollie Sledge, having lawful authority to consent to a search of dwelling) at her job. After arriving she discovered (from the interior's appearance and conferring with my brother) that the detectives had searched her home before notifying her of their need or intent to search. Detectives proceeded to question Ollie Sledge concerning a locked briefcase (of which she had no interest) within my bedroom (exclusively for my use, although she had free access as head of household). Ollie Sledge told officers that she had nothing to hide and consented to their opening my locked briefcase. After reading documents within, both detectives departed. Following my rearrest on February 8, 1990 and while incarcerated, my sister (not a residence on mentioned dwelling) removed documents (concerning my military discharge in 1984) from this briefcase and delivered them to Detective Westbrook (of the Columbus Police Department) who made a photocopy of such. Documents were presented as part of evidence before a Lowndes County Grand Jury that indicted me for two (2) Counts of voyeurism and documents were delivered to officials at the State's Mental Hospital at Whitfield where I was transferred to in November 1990 to undergo a psychiatric examination and where I was extensively questioned concerning mentioned documents.

SUMMARY OF ARGUMENT

After arresting Plaintiff for an alleged offense of voyeurism, were there probable cause to search his residence for evidence of a crime? Were there exigent circumstances to search dwelling house without a valid search warrant? After their initial entry and search, was the subsequent consent to search faulty? Did Plaintiff's mother have lawful authority to consent to officer's request to break open Plaintiff's locked briefcase in his absence and without his knowledge. After gaining access to interior of briefcase, did officers have reasonable cause to read papers and documents within? Following their search, did detectives of the Columbus Police Department have authority to receive documents from a trespasser without first obtaining a legal search warrant; proceed with these documents before a Grand Jury that indicted Plaintiff for voyeurism and aid in delivering documents to the States Hospital in Whitfield.

ARGUMENT

After arresting plaintiff for allegedly peeping in a window were there cause to search his residence State v. Logan 23 NC App 461 Probable Cause, as used in the fourth Amendment means a reasonable ground to believe that the proposed search will reveal the presence upon the

premises to be searched of the objects sought and that those objects will aid in the apprehension or convictions of the offender Coolidge v. New Hampshire 29 L ed 2d 563; and Dyke v. Taylor Implement Mfg. Co 20 L Ed. 2d 538; State v. Logan 23 NC App 461; Brettiv v. Wainwright (CA5 Fla) 439 F. 2d 1042 and People v. Rios (1988, 3rd Dist.) 205 Cal App 3d 833, were there immediate need for their protection of life or property to enter dwelling initially without consent or a valid search warrant 68 Am Jur 2d § 44 Requirement of exigent circumstances Coolidge v. New Hampshire 29 L Ed. 2d 564. In addition to probable cause for the search and seizure without a warrant, there must also exist "exigent circumstances" in which it would not be practicable to obtain a warrant, in order to bring into play this exception to the warrant requirement Smith v. State (1982, Miss.) 419 So 2d 563. Basic elements of "exigency" doctrine are that (1) Police must have reasonable grounds to believe that there is immediate need for their assistance for protection of live or property, (2) Search must not be primarily motivated by intent to arrest and seize evidence, and (3) there must be some reasonable basis, approximating probable cause to associate emergency with area or place to be searched. Hornblower v. Florida (1977, Fla) 351 So 2d 716; Vale v. Louisiana 26 L Ed. 2d 409; People v. Lloyd (1989, 2nd Dist.) 216 Cal App 32 1425; State v. Allison 298 NC 135. After initially searching the dwelling house without a warrant absent exigent circumstances or permission, was the subsequent consent to further their search faulty, People v. Icenogle (1977) 139 Cal. Rptr 637, 71 C.A. 3d 576; An illegal entry vitiates a subsequent consent to further their search. State v. Johns (Mo. 1984) 679 S.W. 2d 253, 84 L Ed. 2d 796; Norman v. State (1980 Fla) 379 So 2d 643 and L Bass v. State (1987, Tex Crim) 732 SW 2d 632. In detectives requesting permission from Plaintiff's mother to break open his locked briefcase, did she have authority to consent to such a request U.S. v. Butler (D.C. Ark 1980) 495 F Supp. 679. Defendant had reasonable expectation of privacy in bureau drawer and suitcase, and thus defendant's father had no lawful authority to consent to search thereof and search was invalid, even though father, acting upon suggestion of investigating officers, was individual who actually unlocked the suitcase; In re Scott K., (1979) 595 P. 2d 105; People v. Nunn Ill. App 1972 288 N.E. 2d 88. After opening briefcase, did officers have authority to read documents within; U.S. v. Jankowski (D.C. Pa, 1979) 470 F Supp. 464, 100 S. Ct. 530; Once defendant's briefcase was within exclusive control of inspectors and there was no danger that defendant might gain access to briefcase to seize weapon, defendant reasonably was entitled to protection of search warrant before his privacy interest in contents of briefcase was invaded. U.S. v. Hellman (C.A. 1977

556 F d 442; U. S. v. Bosby (C.A. Ala. 1982) 675 F 2d 1174; Bretti v. Wainwright (CA 5 Fla) 439 F 2d 1042 and Arizona v. James T. Hicks (1978) 94 L. Ed. 2d 347. In process of illegal search, Plaintiff was incarcerated; had no control over briefcase, nor had he given anyone permission to break open his briefcase. U.S. v. Schleis (C.A. Minn. 1978) 582 F 2d 1166. Briefcase is likely to be within arrestee's immediate control and thus may be subject to Chimel exception to warrant requirement and its rational of protecting officers from possible physical harm and preventing possible destruction or concealment of evidence; however, justification for search evaporates once officers seize briefcase or other personal property and reduce it to their exclusive control; U.S. v. Jankiwski (D.C. Pa. 1979) 470 F Supp. 464, 62 L Ed. 2d 425. Following their illegal search did detectives have authority to receive documents from a trespasser; Cochran v. State (Miss. 1941) 2 So 2d 822; Evidence proferred by private person who observe an illegal police search has been excluded under the theory that the private person should not be allowed to introduce into evidence that which the illegal action of the government agent has revealed. After receiving documents, could detectives proceed with documents before a grand jury (that subsequently indicted Plaintiff for voyeurism) and aid in delivering documents to states hospital in Whitfield; Illinois Migrant Council v. Pilliod (D.C. Ill. 1982) 531 F Supp. 1011. The Fourth (4th) Amendment prohibits issuance of a warrant to enter and search a dwelling on anything less than probable cause to believe that evidence of violations of law will be found on premises. Covington v. Cole (C.A. Tex. 1976) 528 F 2d 1365. Allegations in Civil Rights Complaint of a warrantless search of Plaintiff's home was sufficiently specific to state a claim on actionable violation of Plaintiff's Rights under this amendment and stated a claim upon which relief could be granted.

This the 30th day of November, 1992

"s/Willie H. Bankhead
Plaintiff
S.M.C.I. # 75900
GP-11-B-76
P.O. Box 1419
Leakesville, Ms. 39451

SUBSCRIBED AND SWORN BEFORE ME, in my presence, this the 30th day of November, 1992, A.D.

"s/Zandra R. McLeod

NOTARY PUBLIC

My Commission Expires: May 25,1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

WILLIE H. BANKHEAD — PLAINTIFF
V. — CIVIL NO. 1:91CV359-S-D
CITY OF COLUMBUS, ET AL — DEFENDANTS

ORDER

This cause is before the court of plaintiff's motion with specific objections to the court's dismissal and motion to reconsider. Since the Federal Rules of Civil Procedure do not recognize a "motion for reconsideration," this court must determine whether to treat this as a motion "to alter or amend" under Rule 59 (e), Fed. R. Civ. P., or as a motion for "relief from judgment" under Rule 60 (b), Fed. R. Civ. P. Lavespere v. Niagara Machine & Tool Works, 910 F.2d 167, 173 (5th Cir. 1990). If the motion is served within 10 days of the judgment, the motion will be construed under Rule 59(e); however, if it is served after that time, it will be under Rule 60 (b), id. The final judgment of the court was filed March 7, 1994, and plaintiff's "motion for reconsideration" was filed March 15, 1994, therefore, plaintiff's motion will be construed as a Rule 59 (e) motion to alter or amend a judgment. The court finds that plaintiff has failed to present any evidence or claims which were not previously reviewed by the court and the court remains unpersuaded to alter the initial judgment; therefore, plaintiff's motion is hereby denied.

SO ORDERED

THIS, the 24th day of March, 1994.

"s/L. T. Senter Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIE H. BANKHEAD — PLAINTIFF
V. — CIVIL NO. 1:91CV359-S-D
CITY OF COLUMBUS, ET AL — DEFENDANTS

ORDER GRANTING MOTION TO DISMISS
AND/OR FOR SUMMARY JUDGMENT

Plaintiff files this complaint stating that the defendants violated his constitutitional rights by falsely arresting him. On February 6, 1990, two Columbus, Mississippi police officers responded to the complaint of Misty and Toby Atkins, that there was a man peeping into the window of their neighbor's apartment. Defendant Larry Taylor and another officer, who is not named as a defendant in this suit, arrived at the scene and observed and individual walk behind the apartment buildings just as they arrived. Defendant Taylor walked behind the building and spotted plaintiff sitting on the steps of the apartment complex. He then apprehended the plaintiff, arresting him for voyeurism.

On February 7, 1990, an arrest warrant was issued charging plaintiff with violating Miss. Code Ann. § 97-29-61 (1972), namely being a peeping tom. Plaintiff then posted bond and was released from custody. On February 8, 1990, another alleged victim, Ms Krupica, contacted the Columbus Police Department and filed a complaint against the plaintiff for a separate act of voyeurism, which also allegedly occurred on February 6, 1990. Another arrest warrant was obtained, and plaintiff was again arrested. As a result of a second charge, plaintiff's bond was increased, and he was held in custody until he posted bond on February 23, 1990. Defendant John Peevey is apparently responsible for executing the second arrest warrant sworn out against plaintiff.

The first inquiry in any §1983 action is whether the plaintiff was deprived of a right "secured by the constitution and laws." Baker v. McCollan, 443 U.S. 137, 143 (1979). Plaintiff provides no supporting facts to substantiate his allegation that he was ilegally arrested. It is apparent from his complaint and the discovery filed in this case, that both arrest warrants were issued by impartial magistrates. The court notes that a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial. See Gerstein v. Pugh, 420 U.S. 103 (1975).

According, it is apparent that the officers connected with plaintiff's

arrest are entitled to "good faith" immunity if they considered themselves as exercising their duty in accordance with the law. See Mitchell v. Forsyth, 472 U.S. 511 (1985). In addition, qualified immunity is available, if a reasonably competent law enforcement officer believed that his conduct did not violate the clearly established law. See James v. Sadler, 909 F. 2d 834 (5th Cir. 1990); Harlow v. Fitzgerald, 57 U.S. 800 (1982). In this case, the defendants directly responsible for plaintiff's arrests, Taylor and Peevey, acted as reasonably competent officers under the circumstances in effecting the arrest of plaintiff pursuant to valid arrest warrants. Therefore, the court is of the opinion that the claims against them should be dismissed.

Plaintiff also sues Billy Pickens, an employee of the Columbus Police Department. It is apparent, however, that defendant Pickens had no part in the arrest in question, and in fact his association with plaintiff's claims is never brought forward. Therefore, it is the opinion of this court that hi should be dismissed as a defendant in this case.

As for the claims which plaintiff asserts against the City of Columbus, those arises only because the named defendants were employed by the city. Under 42 U.S.C. § 1983, respondeat superior liability does not exist and therefore, the city is not subject to liability for the actions of its employees. Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978).

Accordingly, it is **ORDERED**:

That defendant's motion to dismiss and/or for summary judgment is well taken and is **GRANTED.**

That this cause is hereby **DISMISSED WITH PREJUDICE.**

SO ORDERED this the 7 day of March, 1994.

"s/L.T. SENTER Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIE HOWARD BANKHEAD PLAINTIFF
VERSUS CIVIL ACTION NO. EC91-359-S-D
CITY OF COLUMBUS, BILLY PICKENS,
LARRY TAYLOR AND JOHN PEEVEY DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO DISMISS AND/OR SUMMARY JUDGMENT

I FALSE IMPRISONMENT

The Complaint in this cause states the sole claim of wrongful imprisonment as the cause of action. The action was filed in United States District Court but does not state the jurisdiction invoked. **Pierson v. Ray**, 352 F.2d 213 (5th Cir. 1965) establishes that the common law tort of false imprisonment is a state court cause of action. The issuance of the arrest warrant in and of itself is sufficient for the officers to believe that the arrest was constitutional and, therefore, no cause of action is stated for Plaintiff. The Constitution does not protect the Plaintiff against the common law tort of false imprisonment and the mere allegation of such, even if committed by state officials acting under color of law, does not in and in itself constitute a §1983 constitutional tort. Harris v. Friedline, 585 F. Supp (Va. 1983). The conduct of the Defendants is insufficient to bring them within the parameters of 42 U.S.C. § 1983 as the conduct did not amount to a deprivation of life or liberty without due process of law but, in fact, was a result of the issuance of arrest warrants which is, per se, probable cause and, therefore, constitutionally acceptable.

False imprisonment was analyzed in Prosser and Keaton, the Law of Torts, §1154 (5th Ed. 1984):

"The distinction between the two (false imprisonment and malicious prosecution) lies in the existence of valid legal authority for the restraint imposed. If the Defendant complies with the formal requirements of the law, as by swearing out a valid warrant, so that the arrest of the Plaintiff is legally authorized, the Defendant is not responsible for the acts of the Court and its officers. The Defendant is therefore liable, if at all, only for the misuse of legal process to effect a valid arrest for an improper purpose, The action must be for malicious prosecution, upon proof of malice and want of probable cause, as well as termination of the

proceedings in favor of the Plaintiff. The weight of modern authority is that where the Defendant has attempted to comply with legal requirements, and has failed to do so through no fault of the Defendant's own, malicious prosecution. The policy is to give the Defendant privilege of making reasonable efforts to bring the case properly before the Court, without liability unless the Defendant's reason for doing so is and improper one."

In and action for false imprisonment, the burden is on the Plaintiff to prove that he was detained and that his detention was unlawful. State v. Moore, 174 So.2d 352, 354 (Miss.1965). An action for false imprisonment cannot be sustained if the arrest of detention is accomplished by virtue of process legally sufficient in form and duly issued by Court or official having jurisdiction to issue same. King v. Weaver Pants Corporation, 127 So. 718, 719 (Miss. 1930). Plaintiff was arrested pursuant to two separate and valid arrest warrants for two separate criminal acts. The Defendant police officers, in obtaining the warrants, complied with the formal requirements of the law. The acts of the judicial officer in issuing the warrant are covered by judicial immunity. The Plaintiff's claim should be dismissed as to each Defendant and/or summary judgment granted to each Defendant.

II. IMMUNITY DEFENSE

Qualified immunity cloaks a police officer from liability if a reasonably competent law enforcement agent would not have known that his actions violated clearly established law. James v. Sadler, 909 F. 2d 834, 838 (5th Cir. 1990). A constitutional right must be implicated and the contours of the right be sufficiently clear that a reasonable official would understand that what he is doing violates that law. Qualified immunity is a defense which has as a principal reason shielding the officers not only from liability but also from defending against lawsuit. Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit, 954 F.2d 1054, 1057 (5th Cir. 1992). Qualified immunity even provides ample room for mistaken judgments by protecting all officers but the plainly incompetent or those who knowingly violate the law. Hunter v. Bryant, 112 S. Ct. 534 (1991). Defendant Pickens took no action whatsoever in this case and it is the sworn legal duty of Defendants Taylor and Peevey to serve arrest warrants on subjects named in the warrants.

Defendants City has no custom or policy alleged against in, proved, or attributable to it which would subject it to liability for the two arrests by warrant. The crimes of voyeurism and habitual offender are also defined by state Legislature. Monell v. New York City Department of

Social Services, 436 U.S. 658, 56 L. Ed. 2d 611 (1978); Pembaur v. City of Cincinnati, 475 U.S. 469 , 89 L Ed. 2d 452 (1986); City of St. Louis v. Praprotnik, 485 U.S. 112, 99 L Ed 2d 107 (1988).

All Defendants are entitled to either a dismissal of the suit, summary judgment and/or the protection of qualified or other immunity.

Respectfully submitted,

CITY OF COLUMBUS, BILLY PICKENS, LARRY TAYLOR AND JOHN PEEVEY

BY: "s/Katherine S. Kerby
KATHERINE S. KERBY,
ATTORNEY FOR DEFENDANTS
MSB # 3584

OF COUNSEL:
GHOLSON, HICKS, NICHOLS AND WARD
POST OFFICE BOX 1111
COLUMBUS, MS. 39703-1111
(601) 243-7310 / (601) 327-0662

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60804
USDC No. 1:94CV26-S-D

WILLIE H. BANKHEAD

Plaintiff-Appellant

versus

STATE O MISSISSIPPI, PATRICIA SPROAT,
CITY OF COLUMBUS, DONALD FRESHOUR,
JOHN PEEVEY, DAVID TURNER, LARRY TAYLOR,
BRIAN OSTERHOUSE, SELVAIN MCQUEEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

ORDER:

Prisoner-appellant Willie H. Bankhead filed a notice of appeal in this civil action after April 26, 1996, the effective date of the Prison Litigation Reform Act of 1995 (PLRA). The PLRA requires a prisoner appealing in forma pauperis in a civil action to pay the full amount of the filing fee, $105. The prisoner-appellant shall pay the full amount, and, if funds for immediate payment are not available, this court shall assess and when funds exist, collect, as a partial payment of the filing fee, 20 percent of the greater of (A) the average monthly deposits to the prisoner's trust-fund account or (b) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the notice of appeal. After payment of the initial partial filing fee, funds shall be deducted from the prisoner's account until the full filing fees are paid. See 28 U.S.C. § 1915 9b) (1) (2).

The prisoner-appellant has 30 days from the date of this order to comply with the PLRA requirements. They are:

1) pay the appellate filing fee of $105 to the clerk of the district court; or

2) (a) file an affidavit in this court stating all assets the prisoner-appellant possesses; and

(b) file a certified statement by the custodian of the prisoner's trust-fund account for the six-month period immediately preceding the date of the filing of the notice of appeal, November 14, 1996.

The clerk of this court is directed to provide the prisoner with the proper forms for compliance with this order.

This appeal in held in abeyance until the prisoner-appellant complied with this order or until the expiration of 30 days, whichever comes first. If the prisoner-appellant does not comply within 30 days, the clerk is directed to dismiss the appeal for lack of prosecution. See Fifth Circuit Rule 42.3.

SO ORDERED.

"s/ Henry A. Politz
CHIEF UNITED STATES
CIRCUIT JUDGE

U.S. COURT OF APPEALS
FILED
JAN 9 1997
CHARLES R. FULBRUGE III
CLERK

APPEAL CLOSED
1983

U.S. District Court
Northern District of Mississippi (Eastern)

CIVIL DOCKET FOR CASE # : 94- CV-26

Bankhead v. State of MS, et al
Assigned to: Chief Judge L.T. Senter, Jr.
Demand: $0.00
Lead Docket: None
Dkt# in other court: None

Nature of Suit: 550
Jurisdiction: Federal Question

Cause: 42:1983 Prisoner Civil Rights

Willie H. Bankhead
plaintiff

Willie H. Bankhead
[COR LD NTC] [PRO SE]
2207 Washington Ave. S.
Columbus, MS 39701

v.

STATE OF MISSISSIPPI
defendant

PATRICIA SPROAT
defendant

CITY OF COLUMBUS
defendant

DONALD FRESHOUR
defendant

JOHN PEEVEY
defendant

DAVID TURNER
defendant

Docket as of January 27, 1997 10:58 am Page 1 NON PUBLIC

INTERNAL USE ONLY: Proceedings include all events. APPEAL
1:94cv26 Bankhead v. State of MS, et al CLOSED
1983

LARRY TAYLOR
defendant

BRIAN OSTERHOUSE
defendant

SELVAIN MCQUEEN
defendant

INTERNAL USE ONLY: Proceedings include all events. APPEAL CLOSED 1983
1:94cv26 Bankhead v. State of MS, et al

1/31/94	1	PRISONER COMPLAINT challenging conditions of confinement. CASE REFERRED to Magistrate Judge Jerry A. Davis; Case Assigned to CJRA Track: Administrative (dlh)
1/31/94	2	Motion by Willie H. Bankhead to Proceed in Forma Pauperis (dlh)
1/31/94	--	NOTICE OF ASSIGNMENT Chief Judge L.T. Senter Jr. and Magistrate Judge Jerry A. Davis (dlh)
3/23/95	3	ORDER granting [2-1] motion to Proceed in Forma Pauperis, and set Spears/Evdentiary Hearing for 9:00 4/12/95 Location: Oxford (signed by Magistrate Judge Jerry A. Davis on 3/23/95) (rke)
3/30/95	--	NOTICE of Hearing: reset Spears/Evidentiary Hearing for 9:00 5/18/95 Location: Oxford before Magistrate Judge Jerry A. Davis (dlh)
5/19/95	4	CIVIL MINUTES for: Spears hearing held 5/18/95; cause taken under advisement (dlh)
5/19/95	--	Spears/Evidentiary Hearing held 5/18/95 before Magistrate Judge Jerry A. Davis (dlh)
10/26/95	5	REPORT AND RECOMMENDATIONS of Magistrate Judge Jerry A. Davis Case no longer referred to Magistrate Judge Jerry A. Davis Objections to R and R due by 11/3/95 (jsw)
11/6/95	--	Acknowledgment of receipt of Report and Recommendations by Plaintiff 11/3/95 (jsw)
11/6/95	6	OBJECTIONS to [5-1] report and recommendations

by Willie H. Bankhead (jsw)

3/22/96	7	ORDER directing court reporter to transcribe and file record of proceedings conducted 5/18/95; all costs of transcript to be paid by United States (signed by Chief Judge L.T. Senter Jr. on 2/22/96) (jsw)
4/15/96	--	TRANSCRIPT of Spears hearing before Magistrate Judge Davis filed for dates of May 18, 1995 (jsw)
10/18/96	8	ORDER AND FINAL JUDGMENT ADOPTING and APPROVING [5-1] report and recommendations; cause DISMISSED with prejudice (signed by Chief Judge L.T. Senter Jr. on 10/18/96) COB #49 pg. 237 Date of Entry: 10/18/96 (rke)
10/18/96	--	Case closed (rke)
10/25/96	--	ACKNOWLEDGEMENT OF RECEIPT by Willie H. Bankhead to [8-1] order (dlh) [Entry date 10/28/6]
11/14/96	9	NOTICE OF SERVICE of notice of appeal by Willie H. Bankhead to State of Ms, Patricia Sproat, City of Columbus, Donald Freshour, John Peevey, David Turner, Larry Taylor, Brain Osterhouse, Selvain McQueen (jlj)
11/14/96	10	NOTICE OF APPEAL of [8-1] order by Wille H. Bankhead (jlj)
11/18/96	--	Transmitted Supplemental Record on Appeal: [10-1] appeal by Willie H. Bankhead (jlj)
12/2/96		NOTICE of Docketing ROA from USCA Re: [10-1] appeal by Willie H. Bankhead USCA Number: 96-60804 (dlh)
12/9/96	--	USCA Case Number Re: [10-1] appeal by Willie H. Bankhead USCA Number: 96-60804 (jlj)

1/27/97 -- USCA appeal fees received FILING FEE $105 RECEIPT #45518 (jlj)

CERTIFYING STAMP
I hereby certify that the foregoing is a true copy of the original thereof now in my office
Attest 1-27-97
Norman L. Gillespie, Clerk
By"s/Jennifer L. Joues D.C.

MANDATE
From The
SUPREME COURT OF MISSISSIPPI

To The Lowndes County Circuit Court- GREETINGS:

On 21st Day of October, 1993, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case # 91-KA-0020
Trial Court Case # 11843

RECEIVED
NOV 18 1993
CMCF RECORDS

Willie H. Bankhead
vs.
State of Mississippi

Reversed and Rendered. Prather, P. J., Not Participating.
Lowndes County is taxed with all costs of this appeal

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

RECORDS DEPT
RECEIVED

NOV 29 1993
SOUTH MISSISSIPPI
CORRECTIONAL
INSTITUTION

WITNESS, the Hon. Armis E. Hawkins, Chief Justice of the Supreme Court of Mississippi also the signature of the Clerk and the Seal of said Court hereunto affixed in the City of Jackson, on November 16, 1993, A.D.

"s/ Linda Stone
Supreme Court Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

WILLIE BANKHEAD,
Plaintiff,

vs.

LOWNDES COUNTY, et al
Defendants

No. 1: 94CV26
May 18, 1995
9:00 a.m.
Oxford, Mississippi

TRANSCRIPT OF SPEARS HEARING
BEFORE THE HONORABLE JERRY A. DAVIS
UNITED STATES MAGISTRATE JUDGE

Appearances:
For the Plaintiff: Willie Bankhead, Pro Se
2207 Washington Avenue
Columbus, Mississippi 39701

Reported by: Cecily B. Faulkner, C.S.R.
Post Office Box 118
New Albany, Mississippi 38652

Proceedings recorded and taken by machine shorthand; transcript produced by computer-aided transcription.

ORIGINAL

THE COURT: Mr. Bankhead, we,ve set this for a Spears Evidentiary Hearing. Apparently, you,ve sued several people in Lowndes County. Did you get the blue sheet of paper that explained to you what a Spears Hearing is?

THE WITNESS: Yes I did.

THE COURT: Have you got any questions about that?

THE WITNESS: No, sir.

THE COURT: If you'll raise your right hand and let Mrs. Blankenship swear you in, please.

WILLIE BANKHEAD

having been duly sworn, testified as follows:

THE COURT: Okay. The purpose o this, Mr. Bankhead, is for you to explain to me exactly what you case is about. I note that you sued some people in 1991 over some of the same type of matters. But, why don't you tell me what this is all about.

THE WITNESS: Sir, this is what I mean about being convicted in Lowndes County, being sentenced to Parchaman for five years, my case being reversed and rendered.

THE COURT: When was it reversed?

THE WITNESS: October of '93.

THE COURT: October of '93?

THE WITNESS: Yes, sir.

THE COURT: What was the basis for the reversal?

THE WITNESS: That the State's case was purely circumstantial evidence.

THE COURT: Okay. You had a reversal on your case. Are you then complaining that you've sued, are malicious prosecution; is that this is all about?

THE WITNESS: Yes, sir. Yes sir.

THE COURT: What about the case you filed in 1991?

THE WITNESS: The one against the --

THE COURT: Right.

THE WITNESS: -- City of Columbus?

THE COURT: City of Columbus, Billy Pickens, Larry Taylor and John Keaton?

THE WITNESS: That on went all the way up to the U.S. Supreme Court, and the U.S. Supreme dismissed the petition or a Writ of Certiorari, and I didn't file for it here.

THE COURT: Isn't that the same type of case, the same case?

THE WITNESS: That case is against the City of Columbus for false arrest and imprisonment.

THE COURT: But it was on the same charges, wasn't it?

BEST AVAI

THE WITNESS: No, sir. This was just or the arrest.

THE COURT: But I understand it's or the arrest on the voyeurism, the same charge that you were convicted of and then subsequently was reversed and rendered; is that not correct?

THE WITNESS: Yes, sir.

THE COURT: What was the basis o the dismissal?

THE WITNESS: In the Supreme Court or the -- well, I mean, each court dismissed it, the U.S. District Court in Aberdeen, the U.S. Appeals Court in New Orleans. They affirmed the--

THE COURT: Dismissal?

THE WITNESS: -- dismissal.

THE COURT: What was the date o your reverse and rendering?

THE WITNESS: October the 21st, 1993.

THE COURT: Mr. Bankhead, I'm going to have to review that other case as well as the opinion from the Mississippi Supreme Court. It may be, and I'm not saying that it is--

THE WITNESS: I understand.

THE COURT: -- some issue of res judicata that I have to take a look at. I don't have that other case in front of me. I will have to go pull the court records on that. Here's what I will do: If it is , I will make some recommendations to dismiss, if it's not, then we'll issue some process and get your case geared up. But I'm going to have to review that case before I decide that.

THE COURT: What is your address now? We've got your right address?

THE WITNESS: 2207 Washington Avenue.

THE COURT: Okay. I'll try to get something done in the next few week.

THE WITNESS: That will be fine, sir. Thank you.

THE COURT: Okay. Thank you, Mr. Bankhead.

(PROCEEDINGS CONCLUDED)

LABLE COPY

CERTIFICATE OF SERVICE

I, Cecily B. Faulkner, Certified Court Reported and Notary Public, Union County, Mississippi, do hereby certify that the foregoing 5 pages, and including this page, contain a full, true and correct transcript of the proceedings as taken by me by means of Stenograph machine and CAT at the time and place heretofore stated in the aforementioned matter and later reduced to transcript form by me to the best of my skill and ability.

I further certify that I am not related to or in any way associated with any partied to said cause of action, or their counsel, and that I am not interested in the event hereof.

IN WITNESS WHEREOF, I have hereunto set my hand this the 6th day of March, 1998.

"s/ Cecily B. Faulkner
Cecily B. Faulkner

My C.S.R. Number is: 1157
My Commission Expires: 7-29-98